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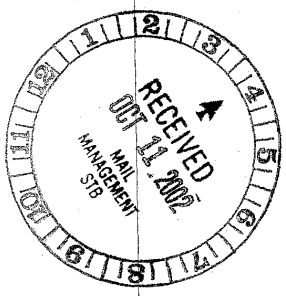
October 11, 2002



VIA HAND DELIVERY

ENTERED
Office of Proceedings
OCT 11 2002
Part of
Public Record

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, DC 20423

Re: Ex Parte No. 638; Procedures to Expedite Resolution of Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology

Dear Secretary Williams:

Enclosed are the original and 10 copies of the "Opening Comments of Edison Electric Institute" for filing in the above-referenced proceeding, and a diskette containing the Comments in WordPerfect format.

Also enclosed are three additional copies for date stamping and return via courier.

Respectfully submitted,

Michael F. McBride

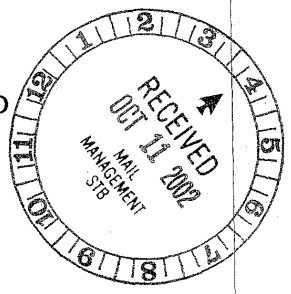
Michael F. McBride

Attorney for Edison Electric Institute

Enclosure

206392

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD



EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES
TO BE CONSIDERED UNDER THE STAND-ALONE METHODOLOGY

OPENING COMMENTS OF EDISON ELECTRIC INSTITUTE
AND REQUEST FOR ORAL ARGUMENT

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Due Date: October 11, 2002
Dated: October 11, 2002

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES
TO BE CONSIDERED UNDER THE STAND-ALONE METHODOLOGY

OPENING COMMENTS OF EDISON ELECTRIC INSTITUTE AND REQUEST FOR ORAL ARGUMENT

Interest of Edison Electric Institute

Edison Electric Institute ("EEI"), the association of the investor-owned electric utility industry, hereby submits its Opening Comments in this proceeding. EEI has appeared before the Board in many proceedings. As the Board knows, many of the rail rate complaints filed with the Board are filed by EEI's member companies. Coal-fired power plants generate over 50 percent of the Nation's electricity. EEI's members ship, by railroad, hundreds of millions of tons of coal annually, to generate much of that electricity. Accordingly, EEI has a great interest in this proceeding.

Position of EEI

In its Notice of Proposed Rulemaking ("NPR"), the Board proposes (1) to require mediation before a rate complaint can be filed with the Board, (2) to expedite the resolution of discovery disputes, and (3) to limit discovery. We deal with these subjects in that order. We also hereby request oral argument of the matters addressed herein, because EEI believes that the

matters addressed in this proceeding could be better resolved by hearing from counsel with experience in the sort of discovery disputes and mediation proceedings addressed by these proposed rules.

1. Mediation. EEI does not believe that mediation, compulsory or otherwise, will settle large rail rate disputes that would otherwise be the subject of a rate complaint filed with the Board (which, by definition, is the category of rate disputes in question).[1] The reasons for EEI's view include the fact that the shipper and railroad are, by definition, already at "loggerheads" over the matter, or it would not be headed for litigation. (Shippers and railroads, especially in captive situations, are routinely in touch about all matters of the transportation involving them, and can be presumed universally to have discussed the entire set of circumstances involved in the transportation at issue, including the rate the railroad wishes to charge, and the rate that the shipper is willing to pay, at length. Moreover, it has universally been the case, according to assurances that EEI has received from its members, that railroads and shippers do extensive analyses of the matters that may be put at issue before the STB to determine if there is a likelihood of success at the STB.)

Mediation, by definition, cannot compel parties to settle if they do not wish to settle.[2] The reasons for EEI's view also include the fact that no mediator, even one as skilled as a FERC Administrative Law Judge, is capable of determining which of the two proposed rates are closer

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[1] EEI's members typically do not file "small shipment" rate complaints with the STB under the Guidelines developed in Ex Parte No. 347 (Sub-No. 2), and no "small shipment" rate complaint has ever been filed with the STB, so we do not address whether such proceedings, if any were ever commenced, could be resolved through compulsory mediation.

[2] Arbitration and mediation differ in several respects. The most important distinction is that mediation does not result in a binding resolution of the dispute, but arbitration does.

to the level that the STB would prescribe, because to do so requires enormous amounts of data necessary to construct the hypothetical "stand-alone cost" ("SAC") railroad (the only basis for a maximum reasonable rate for a "large" shipper under the ICCTA). The mediator will also not be able to do the sort of analyses that the railroad and shipper will already have done in the course of their negotiations, as described above. All that a mediator could do, in the circumstances, is exhort the parties to settle for a rate in-between the level each party thinks is reasonable. In the circumstances, however, the parties will have already considered such an outcome, and rejected it, before compulsory mediation would ever begin.

Nevertheless, EEI does not unalterably object to the requirement that mediation be used before a rate complaint can be filed, so long as it does not delay the time when a complaint may be filed if mediation does not resolve the matter, and so long as the "good faith" of the parties in mediation is not allowed to become an issue before the Board.[3] This proposal can be accomplished by requiring a railroad to quote a common carrier rate a reasonable time (say five

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[3] The Board also should provide for an exception to the requirement for compulsory mediation if the parties, or either of them, certify to the Board that mediation should not be invoked because it is not likely to resolve the matter. A recent decision of the First Circuit illustrates the point: it held that federal district courts have the inherent authority to require parties to a case before it to engage in involuntary mediation, but only if the case is an appropriate one for mediation, and the order requiring the mediation "must be crafted in a manner that preserves procedural fairness and shields objecting parties from undue burdens." In re Atlantic Pipe Corp., ___ F.3d ___, 71 U.S.L.W. 1197 (1st Cir. 2002). This "safety valve" may be especially important if time is of the essence, or where the parties are certain, based on prior discussions, that mediation will not resolve the matter. Recently, for example, the electricity business has become far more competitive, and an excessive rail rate may determine whether the electricity from a particular generating station is competitive The Board should also recognize that, although the filing fee for a rate complaint (now $61,400) is already very high, the proposal for mandatory mediation necessarily will increase the filing fee by including in the cost of these proceedings the cost of the mediators (as well as increase cost to the shipper and railroad for legal and consulting fees). Thus, mediation may not be useful in some cases, and comes with a cost in all cases.

months) before such a rate goes into effect, so that the shipper is not forced to litigate that rate only after it goes into effect. Accordingly, the Board should provide that a shipper can invoke Board-required mediation at least five months before its existing rail transportation contract (if any) terminates,[4] and that a shipper may not be compelled to continue the mediation after the 60-day period proposed.[5] The way to accomplish both objectives is to allow the rate complaint to be filed, and mediation invoked, simultaneously, rather than in sequence.[6]

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[4] The Board is entitled to permit rate complaints prior to the expiration of the rail transportation contract, notwithstanding Burlington Northern R.R. v. STB, 75 F.3d 685 (D.C. Cir. 1996)("BN"), because that case was decided based on the pre-Interstate Commerce Commission Termination Act ("ICCTA") provisions concerning investigation and suspension of rail rates that were in effect in 1994-95 when the ICC decided the matter and whose time limits were the basis for the Court's holdings. The Board now has regulations, adopted pursuant to the authority granted the Board in the ICCTA, that require railroads to quote a rate within 10 business days of a request for the rate. 49 C.F.R. § 1300.3. Those regulations supersede the Court's holding in BN because they were adopted pursuant to authority granted the STB in the ICCTA (which also repealed the previous time limits on ICC investigations and suspensions, the bases for the Court's holding). After a railroad quotes a rate under 49 C.F.R. § 1300.3, of course, a shipper may challenge it.

[5] The Board suggests that the mediator could seek to extend the mediation process by making a submission to the Board. While the mediator may wish to continue, either the railroad or the shipper (or both) may believe that a continuation of the process would not be productive. Moreover, the Board should explicitly state that a mediator may conclude, prior to the expiration of the 60-day period, that the dispute cannot, in his or her judgment, be successfully mediated, so as to avoid needless delay and expense in such instances.

[6] The Board must have jurisdiction over the rate dispute before it can compel the parties to do anything. If, for example, the compulsory mediation caused the parties to settle their dispute, the settlement would be in a rail transportation contract, over which the Board lacks jurisdiction. Therefore, the Board must require publication of a common carrier rate by the time that compulsory mediation is invoked, in order to have jurisdiction to require the parties to engage in mediation. Thus, it follows that EEI's proposal to require the railroads to publish a common carrier rate by the date on which a shipper would be allowed to invoke compulsory mediation is a function of the Board's limited jurisdiction and an essential jurisdictional prerequisite for promulgation of these proposed regulations. The way to accomplish both objectives is to permit the filing of the rate complaint and the invocation of compulsory

(continued...)

If the Board does not allow the rate proceeding and the compulsory mediation to proceed simultaneously, the requirement for compulsory mediation will delay the adjudication of the reasonableness of the rate in question, rather than expedite it. The Board's very purpose in this proceeding is to expedite rail rate disputes, so it should do nothing to delay them. EEI's proposal would serve both to encourage the parties to reach a resolution of the matter in mediation, while allowing litigation to proceed. Such simultaneous proceedings are commonplace in federal and state courts, and serve to promote dispute resolution while at the same time allowing a dispute that cannot be resolved through mediation to be developed so that the court can resolve it if necessary. The Board's processes should be the same, especially because Congress has clearly stated its intention that rail rate disputes be resolved expeditiously.

No Litigation About "Good Faith." EEI expects all parties to participate in any Board-required mediation in good faith. However, it would not be productive, if the mediation fails, to allow any party to argue before the Board about why the mediation failed.[7] The Board should

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[6](...continued)
mediation to occur simultaneously, which in turn requires the Board to make clear when a shipper can compel a railroad to publish a common carrier rate.

There is no reason that the two processes, adjudication and mediation, could not occur simultaneously. Moreover, the recent experience with rail rate disputes before the STB demonstrates that they are time-consuming and quite contentious. The shipper may need to begin the process as soon as possible so that it has a rate in place as early as possible after its rail transportation contract, if any, has expired. Even allowing a shipper to file a complaint one year before the rate takes effect is almost certain to result in the rate proceeding continuing after the rate takes effect, as the Board knows, given its experience since 1980. (In fact, no such case has ever ended with a rate prescription within one year of its filing, so far as is known to EEI.)

[7] That may be what the Board intended by describing the process as "confidential," but that is not entirely clear. The Board should make it clear.

preclude any argument that mediation was not participated in, in good faith, by any party.[8] Unless a mediator is well-schooled in the intricacies of the SAC methodology, he or she is unlikely to have significant insights into the risks that each side may incur in asking the Board to adjudicate the rate that has been published by the railroad. Accordingly, a mediator may be incapable of evaluating whether a party's position is taken in "good faith," for to do so necessarily requires that one know what outcome the party is risking by taking the position it is taking.

Therefore, while the Board may wish to compel the parties' participation for a period of time (the Board proposes 60 days), either party should be capable of terminating the mediation if that party does not believe it has a reasonable chance of success. Neither party's conduct in the mediation, nor termination of the mediation, should have any effect on the subsequent adjudication of the rate, regardless of the positions taken or the party or parties which caused the mediation to be terminated.

2. Expediting Resolution of Discovery Disputes. EEI supports expeditious resolution of discovery disputes, because these rate challenges should be resolved expeditiously, as Congress intended. However, the Board's proposed new discovery standard may actually increase the time for resolution of discovery disputes, rather than expedite them.

Instead, the Board should announce that it has had sufficient experience with discovery in rail rate disputes to believe that its resolution of those matters in recent years was correct,

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[8] EEI's proposal is consistent with Rule 408 of the Federal Rules of Evidence, which generally precludes settlement offers, responses, discussions and corrective actions from being offered into evidence to prove liability or lack thereof.

whether it granted or denied the discovery, and that it intends to follow its precedents.[9] Moreover, it could announce that it expects the parties to promptly provide the discovery previously allowed (subject to any changes in the resolution of the discovery that the Board has allowed but which it now will limit), without extensive discovery pleadings. Then, the Board could also indicate that, if a party could not obtain the discovery except by filing a motion to compel, the party who does not prevail in response to the motion will be responsible not only for the filing fee for the motion (as the Board proposed) but also the attorney's fees and costs of the moving party as a sanction.[10]

When courts or agencies make clear that, except for extraordinary circumstances, they do not intend to revisit matters they have previously resolved, it quickly becomes apparent that

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[9] The Board could specify which discovery previously allowed it still intends to allow simply by citations to those decisions and which discovery previously sought that it will not allow (either by citations to those decisions, or by clearly describing the new limits, if any). The Board's terminology in the NPR indicates that it has a clear idea about what it considered to have been "abusive," and what it considered to have been legitimate, in previous disputes. It did cite some discovery which it regarded as abusive (although EEI is advised that one such dispute involved an effort to obtain data either from the railroad or its contractor, and the data was obtained through a Board subpoena from the contractor, so the decisions cited in the NPR may not be the appropriate citations). In any event, citations to the specific discovery previously permitted which the Board intends to permit should be a simple matter. Making such a pronouncement in advance, to make it clear that such materials should be produced without the need for motions to compel, would expedite rail rate disputes.

In that way, the Board would eliminate the vagueness that now characterizes its proposal, and also assure the community that these proposed regulations will, in fact, reduce discovery disputes and expedite the resolution of these proceedings.

[10] The Board already has a regulation (49 C.F.R. § 1114.31(b)(2)(iv)) that governs in the circumstances EEI posits. That regulation permits the imposition of such sanctions for failure to comply with a Board order; because the regulations the Board adopts in this proceeding will be adopted pursuant to an order, the regulation would be fully applicable to future discovery disputes without the necessity for another order.

refusing to produce discovery previously allowed will only cause delay, but that ultimately the discovery will be permitted. Thus, the party interposing positions only for delay should be required to compensate the prevailing party, for delay is never a legitimate litigation tactic.

For example, the Board routinely makes available in discovery highly confidential transportation contracts that the defendant railroad(s) has with its other customers so that a complainant has the information it needs to construct the SAC railroad. Although there can be disputes about the proper geographical reach of such a request, the general principle is no longer subject to debate. Therefore, if the Board were simply to state that it intends to continue to apply its precedents about requiring production of such contracts, and perhaps gives general guidance about the geographical reach it considers, at a minimum, to be appropriate, it would reduce if not eliminate the need for motions to compel such documents, particularly if there was a cost to the defendant(s) (in reimbursement for filing fees and attorney's fees) for failing to turn over such documents without the filing and disposition of a motion to compel.

In contrast, the Board's proposed procedures for expeditiously resolving discovery disputes through informal staff summary rulings and expedited appeals to the Board make sense. In addition to those procedures, it would be helpful if the Board committed to holding an informal staff discovery conference if the movant so requests, for oftentimes discussing discovery disputes helps resolve them, or at least clarifies the dispute for the adjudicator.

Another way to resolve discovery disputes expeditiously is to allow the FERC ALJ who has been appointed to conduct compulsory mediation to rule on discovery disputes while the ALJ is still involved in the mediation. This may be especially appropriate if such discovery would facilitate the resolution of the dispute. FERC ALJs are quite accustomed to ruling on discovery

disputes expeditiously, in both FERC matters and rail merger and acquisition proceedings, so allowing them to rule on such matters as part of both the mediation and the proceeding itself would be efficient. (Generally, a mediator does not rule on the merits of a case or proceeding, so as to encourage parties to be candid in mediation, but ruling on discovery that may be useful in both the mediation and the proceeding on the merits would not itself involve the mediator in the resolution of the merits.)

Finally, without changing its existing procedures, the STB could expedite rail rate cases by expediting its own rulings on discovery disputes. EEI is acutely aware that the Board has suffered from staffing limitations due to the amount of its appropriations, so it intends no criticism of the Board in making this suggestion. But, if the STB were to adhere to its existing standard and precedents, rather than change them as it has proposed, it will by definition be possible to decide the initial discovery disputes more expeditiously. Moreover, once the initial determination is made, if the STB reviews the initial ruling only for "clear error," as has been its practice in merger cases following FERC ALJ decisions, the number of such appeals and the time it takes to resolve them should be reduced.

3. Shipper Discovery Now Permitted Should Not Be Limited. The Board proposes to adopt a more restrictive standard for discovery sought by shippers. Instead of the "likely to lead to relevant evidence" standard applicable today, the Board proposes to establish a "clear, demonstrable need" standard. If the Board adopts that approach, it either will still permit shippers to discover all the evidence that they need to present their cases, in which event the new standard will not limit the discovery allowed a shipper, or it will not still permit shippers to discover all of the evidence that they need, in which case the Board may be committing

prejudicial error. But either scenario will lead to at least as many discovery disputes as now, and probably more, for the railroads are certain to argue that a shipper has no "clear, demonstrable need" for discovery shippers have heretofore obtained. Thus, the Board will then spend more time, rather than less, adjudicating such disputes, precisely the opposite of what it intends.

Accordingly, EEI opposes limitations on discovery that the Board has determined that shippers should be allowed. Abusive discovery, whether by shippers or railroads, should not be allowed, but the right way to prevent it is as the Board is now doing, perhaps with sanctions for egregious violations of the discovery process.

Moreover, the Board should not deny a shipper discovery merely because a railroad asserts that the shipper can get similar information, or even the same information, elsewhere. Oftentimes, the information a shipper may obtain elsewhere, if at all, is not as reliable as that maintained by a railroad, or at least the railroad will so assert later. Allowing the shipper to obtain the data from the railroad avoids discovery disputes by permitting each party to rely on the same data, and thus will expedite a resolution of the case.

The wrong way to prevent abusive discovery is to set the discovery threshold higher, as the Board has proposed. If that is the Board's approach, a shipper could not discover even relevant information (let alone information that may lead to relevant information) unless there is a "clear, demonstrable need" for it, according to the Board's proposed new standard. However, it is not clear what the Board now considers "relevant" or "likely to lead to relevant information" that it would not permit to be discovered under its "clear, demonstrable need" standard, but presumably there must be some such evidence or the Board's proposal would accomplish nothing. (Of course, it cannot be presumed that the Board's approach would accomplish nothing,

and therefore we presume that the Board intends to limit discovery allowed to shippers.) Adoption of a more-restrictive discovery standard may, therefore, deprive shippers of relevant evidence, and thus cause prejudicial error, while simultaneously causing more discovery disputes rather than less.

The Board's proposed standard will result in a great deal of litigation about what is a "clear, demonstrable need." The better way to avoid discovery disputes is for the Board to inform the railroads, in advance, that the specific discovery the Board has permitted in various proceedings will be required of the railroads in every SAC proceeding. The Board could do so by rule, but at least one railroad has been changing its internal record keeping recently, in an apparent effort to defeat shippers' requests for documents ordered produced by the Board in earlier proceedings. Accordingly, rules prescribing permitted discovery may need to be drafted generally, to avoid disputes bogging down in arguments over the labels applied to records. The rules could refer to STB decisions, for the agency may proceed by rule or by adjudication to establish agency policy. SEC v. Chenery Corp., 332 U.S. 194, 202-04 (1947).

4. Oral Argument Should Be Allowed. The Board's proposals are of great importance to the shipping community and, for the same reasons, to the railroads. They concern matters about which counsel with experience in such disputes could greatly assist the Board. Moreover, the Board and its staff have little if any experience with mediation, because no party has invoked the Board's ADR process. Accordingly, the Board would undoubtedly benefit from providing a limited amount of time – we suggest two hours, one for shippers and one for railroads – to address these matters. Rather than invite members of the general public, the Board should invite counsel for shippers and railroad parties (and their associations) who have submitted significant

comments in this proceeding to choose a limited number of them to divide the oral argument time permitted each side by the Board. In this manner, focused presentations are likely to be made, which should give the Board members themselves valuable insights from counsel with experience in these matters. This proposal would, of course, also give Board members an opportunity to ask questions.

This NPR has already been the subject of discussion at the September 5, 2002 Senate Commerce Committee hearing on the confirmation of Roger Nober, Esq. to be a member of the Board. It is therefore possible that Members of Congress may also wish to be heard. Of course, if any should request oral argument time, they should be accommodated with additional argument time.

Conclusion

For the foregoing reasons, the Board should (1) compel mediation in rail rate disputes, but only if a rate complaint can be filed at the same time that mediation may be invoked, which of necessity requires that a railroad quote a common carrier rate before the earliest date on which the Board will allow a rate complaint to be filed, (2) not permit litigation before the Board whether a party has participated in good faith in the required mediation. expedite discovery disputes, (3) expedite discovery in rail rate proceedings, (4) either make clear by citations to prior discovery disputes which shipper discovery requests it regards as legitimate and which it regards as "abusive," or set forth by rule the categories of information and documents that a party may

obtain in discovery, and (5) permit oral argument by a limited number of counsel for shipper and railroad parties who submit significant comments in this proceeding.

Respectfully submitted,

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